In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1695

EDWARD R. DAVIES, PETITIONER

v.

THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE SECRETARY OF THE ARMY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The court below held that its 1968 decision in *Davies* v. *Clifford,* 393 F. 2d 496, is a bar to the present action. Petitioner in effect seeks review of the merits of that earlier decision. The only question properly presented here, however, is whether the court below correctly applied the doctrine of *res judicata.*

In 1952, petitioner, then a private in the United States Army, was tried by general court-martial, convicted of arson, and sentenced to be discharged with a bad conduct discharge, to forfeit all back pay and allowances, and to be confined at hard labor for three years. After the findings and sentence were affirmed by a Board of Review and by the United States Court of Military Appeals, petitioner's sentence was ordered into

execution. He was released from custody in 1954. In 1961, following a hearing before the Board for the Correction of Military Records, an Assistant Secretary of the Army, after reviewing the trial record, directed that petitioner's records be changed to show that he received an honorable discharge.

In 1962 the Court of Military Appeals denied a petition for a writ of error *coram nobis,* by which petitioner sought to have his court-martial conviction vacated. Four years later, petitioner, represented by counsel, brought an action in the district court against the Secretary of Defense seeking a declaratory judgment that this court-martial conviction and sentence were invalid. He alleged errors in his trial that violated his constitutional rights. The district court dismissed the complaint for lack of jurisdiction, *Davies* v. *McNamara,* 275 F. Supp. 278 (D. N.H.), and the court of appeals affirmed, *Davies* v. *Clifford,* 393 F. 2d 496 (C.A. 1). The court of appeals held that, since petitioner was in effect seeking "direct review of the conviction" and had already been granted "the administrative relief of voiding his 'punitive sentence'" (393 F. 2d at 497), the court was without jurisdiction. Petitioner did not seek certiorari.

In 1969, petitioner, *pro se,* brought a mandamus action in the district court to compel the Secretary of the Army to issue him a certificate of innocence, to remit all back pay and allowances due, to reinstate him at a higher enlisted rank, to remove all lost time from his records, and to compensate him for his alleged wrongful conviction. The district court denied the petition for mandamus and the court of appeals affirmed, finding "no allegation or evidence" that petitioner "was deprived of constitutional rights in the proceedings leading to his conviction." *Davies* v. *Resor,* 445 F. 2d 1331, 1332 (C.A. 1). Petitioner did not seek certiorari.

In 1972, petitioner again sought a writ of error *coram nobis* from the Court of Military Appeals. Following denial of that petition, he brought the instant action in the district court against the Judges of the Court of Military Appeals and the Secretary of the Army, alleging violations of his constitutional rights and seeking a declaratory judgment that his court-martial conviction is "null and void." The district court dismissed the complaint for failure to state a claim upon which relief could be granted (Pet. App. 25-29). The court of appeals affirmed on a different ground, holding that the action was barred by *res judicata* in view of its previous decision in *Davies* v. *Clifford, supra* (Pet. App. 23-24).

The decision of the court of appeals was correct, and further review is not warranted.

1. Petitioner's present action, like that in *Davies* v. *Clifford,* is predicated upon the claim that the civil courts have jurisdiction to review and declare "null and void" his conviction by a military court-martial 20 years ago, even though he is no longer in custody and has been given an honorable discharge. The court of appeals held in *Clifford* that it had "no jurisdiction to review the Court of Military Appeals" except by a writ of habeas corpus, and that petitioner had already received the "administrative relief of voiding his 'punitive sentence'" (393 F. 2d at 497, and n. 2).

> Whether our present disclaimer be phrased in terms of absence of any present controversy to support a declaratory judgment where petitioner is under no current disability or restraint, or absence of direct jurisdiction over the conviction itself, the district court's dismissal of the petition was correct. [*Id.* at 497.]

In these circumstances, the court below properly concluded that, under the principles of *res judicata*, the earlier decision constituted a bar to the maintenance of petitioner's present action (Pet. App. 23-24).

Petitioner argues that the dismissal in the prior case, since it rested on a question of the court's jurisdiction, "does not operate as an adjudication upon the merits" (Pet. 15). It is settled, however, and petitioner's counsel conceded below (see Pet. App. 23), that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues" (*American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166 (Brandeis, J.)). See also *Hadge* v. *Second Federal Savings and Loan Association of Boston*, 409 F. 2d 1254, 1257 (C.A. 1) ("the principle of *res judicata* applies to a finding of lack of subject matter jurisdiction. * * * A party is entitled to one day in court, but only one"); *Barzin* v. *Selective Service Local Board No. 14*, 446 F. 2d 1382 (C.A. 3) (*res judicata* bars second suit seeking preinduction review of classification where first suit was dismissed for lack of jurisdiction); *Estevez* v. *Nabers*, 219 F. 2d 321 (C.A. 5) (*res judicata* bars second suit where first suit was dismissed for failure to allege a controversy of a justiciable nature); *Acree* v. *Air Line Pilots Assn.*, 390 F. 2d 199 (C.A. 5), certiorari denied, 393 U.S. 852. The court ruled in *Clifford* that it had no jurisdiction over a claim indistinguishable from that presented by petitioner in the instant action. The jurisdictional ruling in *Clifford* was therefore determinative here, and the court properly held that the case must be dismissed regardless of the correctness of the *Clifford* decision (Pet. App. 24).[1]

---

[1] Petitioner argues that the doctrine of *res judicata* is flexible and should not be applied where the policies it serves are

2. Because the court of appeals decided this case solely on the ground that the action was barred by the principles of *res judicata*, it did not consider petitioner's claim that the civil courts can review a court-martial conviction where the serviceman is no longer in custody and has been given an honorable discharge from the armed forces. Indeed, petitioner expressly seeks review in this Court, not of the decision below, but of the 1968 decision in *Davies* v. *Clifford* (Pet. 6-15). We submit that the petition does not properly present the issue.

It is not enough to say, as petitioner does (Pet. 6), that the earlier decision was "held to be determinative in the instant case * * *." The court did not adjudicate the merits of petitioner's claim; rather, it refused to do so on the basis of *res judicata*. Petitioner cannot revivify a five-year old final decision by raising an identical claim and, after dismissal on *res judicata* grounds, seeking review in this Court on the underlying issue presented in the earlier case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

---

outweighed by "the demands of justice in permitting a party to litigate" (Pet. 17). The court of appeals, however, did not reject that argument; it merely held that the circumstances here did not require a suspension of the principles of *res judicata*. Thus, it indicated that it might permit further litigation if, for example, "a statute upon which we had relied had been held to be unconstitutional" after the earlier decision had been rendered (Pet. App. 24). Here, however, there was no such intervening development. The court properly held that it is insufficient merely to question the correctness of the earlier decision. "We do not believe we were mistaken before, but even if we were, that is not enough" (*ibid.*).